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No. 85-164

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the language of six treaties between the United States and various Indian tribes, artificially-reared hatchery fish released into public waters to replace natural fish lost due to development of the waterways are included in the harvestable fishery base that is divided between treaty and non-treaty fishers pursuant to this Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

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OPINIONS BELOW

The opinion of the district court (Pet. App. B1-B41) is reported at 506 F. Supp. 187. The opinion of the en banc court of appeals (Pet. App. A1-A34) is reported at 759 F.2d 1353. An earlier opinion of a panel of the court of appeals, reported at 694 F.2d 1374, was vacated by the en banc court.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 29, 1985. The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1854 and 1855, the United States negotiated six treaties (the "Stevens treaties") with various Indian tribes residing within the boundaries of the then-Territory of Washington. The Indians traded their interest in the land west of the

Cascade Mountains and north of the Columbia River in exchange for reservations, cash payments, and various guarantees, including the right to continue fishing. Each treaty, in substantially identical terms, provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Dec. 26, 1854 (Medicine Creek), United States-Nisquallys Indians, art. 3, 10 Stat. 1133; see also Treaty of Jan. 22, 1855 (Point Elliott), United States-Dwamish Indians, 12 Stat. 927; Treaty of Jan. 26, 1855 (Point No Point), United States—S'Kallams Indians, 12 Stat. 933; Treaty of Jan. 31, 1855 (Neah Bay), United States-Makah Tribe, 12 Stat. 939; Treaty of June 9, 1855 (Yakimas), United States-Yakama Indians, 12 Stat. 951; Treaty of July 1, 1855 and Jan. 25, 1856 (Olympia), United States-Quinailt and Quillehute Indians, 12 Stat. 971.

For years following execution of the treaties, preservation of fish stocks had been successfully accomplished by the customs and practices of the Indian tribes. The fishery base continued in abundance until overfishing and non-Indian activities, including industrial, agricultural, municipal, residential, and other development that causes pollution and has an adverse impact on aquatic life, began to deplete the fish stocks. Much of the destruction and alteration of fish habitat occurred pursuant to explicit state administrative authorizations. Not the least among these state-authorized activities was the substantial growth of the

non-Indian commercial fishing industry and the expanding non-Indian sport fishery. Pet. App. A12, B10, B20-B21.

In an effort to combat the depletion of the fishery base attributable to overfishing and environmental degradation, the State of Washington has placed or allowed to be placed in the waters of the case area anadromous fish that have been artificially reared and planted (Pet. App. B20-B21). Because of the significant damage and diminution of natural anadromous fish runs since the time of the treaties, and because such diminution has resulted from non-Indian activity, the tribes have sought, under the treaties, to harvest their share of all fish stocks that occur at their usual and accustomed places, without regard to whether any particular fish was reared in a natural setting or in a state, federal, or tribal hatchery.

The extent of the Indians' off-reservation fishing rights under the six treaties has been hotly debated for years by the tribes and the State of Washington. In 1970, the United States, on its own behalf and as trustee for the affected tribes, brought suit seeking a declaratory judgment and injunctive relief to define the parameters of and enforce the fishing rights clauses of the treaties. The case was litigated in two phases. This Court eventually decided Phase I of the litigation, holding that the tribes had a right under the treaties to take the lesser of 50% of the fishery base or a quantity sufficient to provide the tribes with a moderate standard of living. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685-687 (1979) [hereinafter cited as *Fishing Vessel*]. The Court declined to decide whether hatchery fish should be included in the fishery base because the district court had not yet reached a final decision on that issue. *Id.* at 689 n.30.

Phase II of the litigation itself involved two distinct components—the "environmental issue" and the "hatchery fish issue." With respect to the environmental issue, the

district court ruled that the treaties granting the Indians "a right of taking fish" impose upon the State of Washington a duty to refrain from taking actions or authorizing others to take actions that substantially impact upon environmental conditions in state-regulated waters so as to prevent the tribes from making a moderate living from fishing (Pet. App. B29-B40). On the hatchery fish issue, the district court ruled that the Indian treaty right extends to all fish taken in the tribes' historic fishing areas, including those released into public waters from state-operated hatcheries (*id.* at B15-B29).

The en banc court of appeals vacated the district court's judgment on the environmental issue, concluding that the necessary predicates for a declaratory judgment had not been met (Pet. App. A7-A9). (The petition does not present any questions concerning the environmental issue.) The en banc court of appeals affirmed the district court's judgment on the hatchery fish issue, holding that the district court correctly concluded that equitable considerations and *Fishing Vessel*'s holding that the tribes are entitled under the treaties to an "adequate supply of fish" supports the inclusion of hatchery fish in the allocation (Pet. App. A9-A13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the court of appeals' decision is entirely consistent with the principles set forth by this Court in *Fishing Vessel*. Accordingly, further review by this Court is not warranted.

1. The Court has consistently held that, in construing Indian treaty rights, legal technicalities should be avoided, and ambiguities and questions of interpretation should be resolved in favor of the Indians. See, *e.g.*, *Fishing Vessel*,

443 U.S. at 676; *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942); *Seufert Brothers Co.* v. *United States,* 249 U.S. 194, 198 (1919); *United States* v. *Winans,* 198 U.S. 371, 380-381 (1905); *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899). Against this backdrop, the court of appeals concluded that hatchery fish should be equally available to Indians and non-Indians. As the district court noted (Pet. App. B20), this Court determined in *Fishing Vessel* that the Indians are entitled to an "adequate supply of fish." Due to diminution of the fishery base by non-Indian activities, an adequate supply of fish can be had only if hatchery fish are included in the fishery base. Hatchery programs were initiated to replace losses caused by man-made deterioration of the fishery habitat (Pet. App. B20-B21). Hatchery fish now account for up to 90% of some anadromous fish runs (*id.* at B22). Furthermore, the trend in recent years has been toward an increasing percentage of the catch consisting of hatchery fish (*id.* at B21). Given these undisputed realities, permitting the tribes to take only a steadily diminishing supply of natural fish could effectively operate to deny them access to their fair share of the resource just as surely as the so-called "equal opportunity" approach rejected in *Fishing Vessel,* 443 U.S. at 676-678. As the Court there stated (*Fishing Vessel,* 443 U.S. at 676 (footnote omitted)):

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. * * * It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," * * * and it is

> accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations.

The court of appeals' ruling on the hatchery fish issue necessarily follows from this observation.

2. Petitioners nevertheless quote (Pet. 5) from Justice White's concurring opinion in *Washington State Game Dep't* v. *Puyallup Tribe,* 414 U.S. 44 (1973), in an attempt to establish that the State had no obligation to supply hatchery fish for Indian use, and, therefore, the State retains all rights in the fish. In a similar vein, petitioners analogize their situation to that of a property owner who creates new waters not previously available to the public and can continue to hold rights to the use of those waters against the general public (Pet. 7). See, *e.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979). Neither argument advances petitioners' cause.

First, although Justice White observed that "the State of Washington [is not obligated] to subsidize the Indian fishery with planted fish paid for by sports fishermen" (414 U.S. at 49), he did recognize that the Indian treaty rights extend to the amount of fish that would have been present had the river been "left to its own devices" (*ibid.*). As found by the district court and affirmed by the court of appeals, the hatchery fish are a replacement for diminution of the fishery base as it would have existed had the State not allowed commercial development, sports programs, and other man-caused destruction of the fishery base. Pet. App. A12-A13, B20-B21 & n.40. See also *Fishing Vessel,* 443 U.S. at 668-669 & nn.13-14. Indeed, it is ironic that the State of

Washington now claims an exclusive interest in hatchery-propagated fish. Prior to 1973, the State made no distinction between hatchery fish and natural fish (Pet. App. A12). From the inception of hatchery programs in 1895, the fish produced thereby have been considered replacements for natural fish lost due to non-Indian degradation of the habitat and commercialization of the fishing industry (*id.* at B21). The Indians should share in the replacement for the original resource as they would have shared in the original.

Second, petitioners argue (Pet. 5-6) that the entity creating the fishery base should have superior rights to the resource. The case cited in support of this proposition, *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324 (1983), is completely inapposite. Contrary to petitioners' assertion, the Court's "critical concern was [not] with who was responsible for the creation of the fishery" (Pet. 5). Instead, the Court held only that the Indian interest in reservation lands—a federally created interest—was superior to the state interest in regulating hunting and fishing. Indeed, the Court recognized that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal law and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 334. Here, there is a strong federal interest in the Indians' treaty right to take fish necessary to their livelihood. The treaties bind the State of Washington under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, which imposes upon the State the obligation to carry out the purposes of the treaties.

Petitioners also argue (Pet. 7) that the State somehow retains "a strong jurisdictional interest" over the hatchery fish, giving it authority to regulate those resources. But the Court in *Fishing Vessel,* 443 U.S. at 684-685, stated:

> Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

The Indians cannot obtain their fair share of the fishery if the State can, by its practices, allow the diminution of the fishery base and then, when it establishes hatcheries to bring the base back up to acceptable levels, exclude the Indians from taking a fair share of those fish "in common with all citizens of the Territory." Free-swimming fish in public waters are *ferae nature* and the property of no one. 2 W. Blackstone, Commentaries* 411. The State's interest in them is therefore regulatory rather than proprietary. *Hughes* v. *Oklahoma,* 441 U.S. 322, 334-335 (1979); *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977). As such, state authority over the Indian fishery lies solely in the area of conservation. *Fishing Vessel,* 443 U.S. at 682 n.25; *Tulee* v. *Washington,* 315 U.S. at 684.

Commonwealth v. *Perley,* 130 Mass. 469 (1881), cited by petitioners (Pet. 7) for the proposition that the State stands in a different position from private parties who release hatchery fish, is instructive in this regard. In *Perley,* the court stated (130 Mass. at 471 (emphasis added)):

> The absolute ownership created by the statute necessarily exists only where and so long as he who propagates or cultivates the fish keeps them within a territory over which he has *absolute control;* as soon as he permits them to pass into territory where others have

> rights of fishery, equal to or greater than his, his ownership is gone, because they may then be rightfully taken by others without his consent. The right of fishery which one has in waters where the fishery is otherwise public or unprotected by statute is not affected by the fact that another, who has a like right, has seen fit to propagate fishes artificially in the waters.

The State here stands on no different footing from others who release hatchery fish into public waters. Both have relinquished all control over the fish. The State lacks "absolute control" over the waters, since the waters are subject to the six treaties. Further, it has already been established that the State does not have a proprietary interest in fish swimming in public waters. *Hughes* v. *Oklahoma,* 441 U.S. at 334-335; *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. at 284. The Indians, therefore, can take hatchery fish as well as natural fish under their rights granted by the treaties.

As already noted, petitioners' analogy to the developed waters doctrine does not apply here. First, the hatchery fish were meant as a replacement for the loss of natural fish due to non-Indian causes and not as an addition to the existing fishery base. Second, in the cases applying the developed waters doctrine, a private right was transformed into something susceptible of public use, but was still held privately. Here, the State released the allegedly privately-owned fish into public waterways for public use. No attempt has ever been made to hold the hatchery fish separate from all others. The hatchery fish are in the same waters as the natural fish and, biologically, the two types of fish are virtually indistinguishable. Clearly, the hatchery fish were never intended to be kept from public consumption which, under the treaties, includes reasonable Indian harvesting.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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